

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7120

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

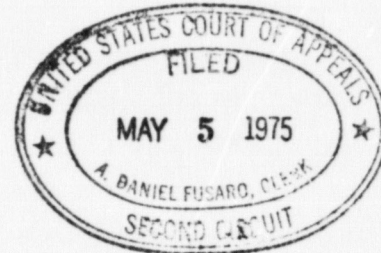
JOSE CORDOVA and AMELIA CORDOVA,
individually and as next friend of
HECTOR TORRES, a minor, and on behalf
of all other persons similarly situated,

Plaintiffs-Appellants,

-vs-

JAMES REED, as Commissioner of the
Department of Social Services of the
County of Monroe, and on behalf of
all other commissioners of local
departments of social services in the
State of New York, and ABE LAVINE, as
Commissioner of the Department of
Social Services of the State of New York,

Defendants-Appellees.:



Docket # 75-7120

B
P/S

BRIEF ON BEHALF OF DEFENDANT - APPELLEE REED

CHARLES G. FINCH, Chief Counsel
Frank P. Celona of Counsel
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Social Services
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Rochester, New York 14620
Tel: 716 - 442-4000
Attorney for Appellee - Reed

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ISSUES PRESENTED

(1) Does N.Y.S. Social Service Law Section 382 violate plaintiff minor's constitutional right to travel or to equal protection?

The District Court held in the negative.

(2) Do the plaintiffs have adequate remedies at law in the N.Y. State Courts?

The District Court held in the affirmative.

(3) May plaintiffs ignore State administrative remedies prior to bringing this action in federal court?

The District Court held in the negative.

STATEMENT OF CASE

The facts are not in dispute. Briefly, Hector Torres is a seven year old minor whose home is in Puerto Rico. Plaintiffs, the aunt and uncle of the child, accepted him into their home in Rochester, New York. In September of 1974, the plaintiffs applied to Defendant Reed's agency for public assistance for said child. The agency denied the application pursuant to the provision of N.Y. Social Service Law Section 382.1. Plaintiffs then requested a State fair hearing, which was scheduled for October 16, 1974; but before it could be held, the plaintiffs intentionally cancelled their request for state review.

Plaintiffs thereafter and on or about October 30, 1974 commenced this action in the U.S. District Court for the Western District seeking preliminary and injunctive relief, a judgment declaring N.Y. Social Service Law Section 382 unconstitutional, the convening of a three judge court. The plaintiffs further moved for a temporary restraining order.

Both defendant - appellees through their counsel opposed the relief requested above by the plaintiff - appellants.

On March 5, 1975, by written decision Hon. Harold P. Burke denied the relief requested by the plaintiffs and dismissed the action.

The plaintiffs appeal the decision of Judge Burke.

It should be noted that appellee James Reed is a local county Commissioner of Social Services. As such, he is obligated to follow the provisions of the N.Y. State Social Service Law. He has no legislative power. This action

attacks the constitutionality of a State statute over which Reed has no jurisdiction or control. Appellee Reed views the statute as a rational support statute.

Appellee Reed has to apply the statute. Assuming, but not conceding, that plaintiffs Cordova should have public assistance for child Torres, they would not have been eligible for said assistance. A public assistance grant for a family of 6 (including child Torres) is approximately \$520 per month. Mr. Cordova earns \$520 per month after taxes. Appendix p. 19. His monthly income is therefore at least equal to and possibly greater than a monthly public assistance grant.

ARGUMENT

POINT I

N.Y.S. SOCIAL SERVICE LAW SECTION 382 IS A SUPPORT STATUTE FIXING RESPONSIBILITY FOR SUPPORT OF A MINOR OUT OF STATE CHILD.

Plaintiffs allege that because the statute deals with non resident minors, that the statute is solely a residency state, and therefore violative of the constitutional right to travel and of equal protection.

The clear intent of the statute is to assure care and maintenance and support of the minor until he is self-supporting. This responsibility is placed on the person bringing the child into the state.

The statute does not inhibit travel in any way and applies equally to all minor non-resident children whether from Puerto Rico or any other state.

The state statutes which were struck down in *Shapiro v. Thompson* 394 U.S. 618 and *Gaddis v. Wyman* 304 F. Supp. 717 affirmed 397 U.S. 49 were statutes specifically establishing one year residency requirements with the express intention of inhibiting travel into a state of people who would seek or need public assistance, and as a condition precedent to becoming eligible for assistance. Section 382 does not establish this requirement.

POINT II

THERE IS ADEQUATE REMEDY AT LAW IN THE N.Y. STATE COURTS

Agency action can be reviewed by State Fair Hearing as provided in N.Y. Social Service Law Section 166 and 18 N.Y.C.R.R. Section 358.4.

The state hearing decision is subject to judicial review by the N.Y. State Courts in Article 78 Proceedings. N.Y.C.P.L.R. Section 7803. The plaintiffs did request a State fair hearing but cancelled it.

N.Y. Civil Practice Law and Rules Article 30 Remedies and Pleading, specifically provides for the remedy of Declaratory Judgment (C.P.L.R. Section 3001). Pursuant to this section, there is a large volume of cases holding that state Courts can rule on the constitutionality of statutes and grant relief where no question of fact is involved. Plaintiffs can obtain a Declaratory judgment in N.Y. State Supreme Court as to the validity and constitutionality of Section 382 which deals with responsibility for support. (See statute and foot notes infra).

POINT III

PLAINTIFFS MUST EXHAUST STATE ADMINISTRATIVE REMEDIES

Plaintiffs allege they bring this action under 42 U.S.C. section 1983 because N.Y.S. Service Law 382 violates a civil right of the child. Since the statute establishes an obligation to support for the benefit of the minor child, plaintiffs seek to nullify the statute so as to cancel their obligation to support and gain public assistance for the child.

The basic issue here is: who is responsible for the support of this child? In this case, N.Y.S. Social Service Law Section 382 places the responsibility on the Cordovas. The Cordovas allege the public should support the child. They attempt, by this action, to transform the issue of support into a constitutional residency question, thereby seeking (a) to avoid and by-pass state administrative and judicial remedies, and (b) to obtain an order from federal courts directing appellees to pay public assistance to the child.

Under the circumstances the ruling in Eisen v. Eastman 421 F 2d 560, 569 (2d Cir. 1969) cert denied 400 U.S. 841 is valid and applicable, and was properly applied by Judge Burke.

CONCLUSION

For the reasons stated above, the decision and judgment of Honorable Harold P. Burke should be affirmed and the action dismissed on the merits.

Respectfully submitted,

CHARLES G. FINCH, Chief Counsel
Frank P. Celona of Counsel
Monroe County Department of Social Services
111 Westfall Road
Rochester, New York 14620
Tel: 716 - 442-4000
Attorney for Appellee - Reed

DATED: April 30, 1975

N.Y. SOCIAL SERVICE LAW

§ 382. Responsibility for children without state residence; license and board

1. Any person, institution, corporation or agency which shall bring, or cause to be brought, into the state of New York any child not having a state residence, or which shall receive or accept any child from outside of the state of New York, not having state residence, shall be responsible for the care and maintenance of such child whether placed out, boarded out or otherwise cared for unless adopted by foster parents. Such responsibility shall continue during the minority of such child and thereafter until he is self-supporting.

N.Y. CIVIL PRACTICE LAW AND RULES

§ 7803. Questions raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
 2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.
- As amended L.1962, c. 318, § 26.

Amendments

L.1962, c. 318, § 26, eff. Sept. 1, 1963, inserted "arbitrary and capricious or" in par. 3.

Source of Section

C.P.A.1920, § 1206 added L.1937, c. 526, amended L.1951, c. 663; L.1953, c. 661.

§ 3001. Declaratory judgment

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

L.1962, c. 308.

123. Constitutional questions—Generally

The remedy of a declaratory judgment is available where a constitutional question is involved, and no question of fact is involved. *New York Foreign Trade Zone Operators v. State Liquor Authority*, 1941, 285 N.Y. 272, 34 N.E.2d 316. See, also, *Dun & Bradstreet v. City of New York*, 1938, 276 N.Y. 198, 11 N.E.2d 728; *Persky v. O'Connell*, 1946, 65 N.Y.S.2d 546.

Action for declaratory judgment constitutes an alternative remedy to article 78 proceeding for administrative review of constitutionality of government action. *Rock Hill Sewerage Disposal Corp. v. Town of Thompson*, 1966, 27 A.D.2d 626, 276 N.Y.S.2d 188.

Constitutional rights may be tested in a declaratory judgment action. *Aerated Products Co. of Buffalo v. Godfrey*, 1942, 263 A.D. 685, 35 N.Y.S.2d 124, reversed on other grounds 290 N.Y. 92, 48 N.E.2d 275.

An action for declaratory judgment is appropriate for determination of a constitutional issue, and jurisdiction of an action raising such a question should be entertained pursuant to the C.P.A. and R.C.P. *National Psychological Ass'n for Psychoanalysis, Inc. v. University of State of N. Y.*, 1959, 18 Misc.2d 722, 188 N.Y.S.2d 151, affirmed 10 A.D.2d 688, 199 N.Y.S.2d 423, affirmed 8 N.Y.2d 197, 203 N.Y.S.2d 821, 168 N.E.2d 619, appeal dismissed 81 S.Ct. 601, 365 U.S. 298, 5 L.Ed.2d 688.

Declaratory judgment actions for determination of jurisdictional and

N.Y. SOCIAL SERVICE LAW

§ 166. Appeals and hearings

Where an application is not acted upon within thirty days after its filing or is denied or the assistance is deemed inadequate by the applicant, or recipient, he may appeal to the department, which, upon receipt of the appeal, shall review the case and shall give the applicant making the appeal an opportunity for a fair hearing thereon. The department may also, on its own motion, review any decision made or any case in which a decision has not been made within the time specified. The department may make such additional investigation as it may deem necessary, and shall make such decision as to the furnishing of assistance and the amount thereof as in its opinion is justified and is in conformity with the provisions of this title. All decisions of the department shall be binding on the social services districts involved and shall be complied with by the social services officials thereof.

Added L.1968, c. 624, eff. June 16, 1968.

18 N.Y.C.R.R.

358.4 Right to a fair hearing. The following persons shall be entitled to a fair hearing:

(a) Applicants for or recipients of aid to dependent children, aid to the aged, blind or disabled, medical assistance for needy persons, home relief or veterans assistance on the following grounds:

- (1) denial of assistance;
- (2) failure to determine the applicant's eligibility and, if found eligible, to issue a cash grant or authorize medical assistance within 30 days from the date his application therefor was made;
- (3) inadequacy in amount or manner of payment of assistance;
- (4) discontinuance or suspension of assistance, in whole or in part;
- (5) objections to department policy as it affects the applicant or recipient's situation; and
- (6) any other grounds affecting the applicant or recipient's entitlement to assistance or the amount thereof or the time of payment thereof, including, but not limited to, determinations of employability where assistance has not been discontinued or reduced.

(b) Applicants for or recipients of aid to dependent children, aid to the aged, blind or disabled, home relief or veterans assistance, and applicants for or recipients of child welfare services, on the following grounds:

- (1) denial of an application for any service required to be provided by a social services official in accordance with applicable provisions of law, rules of the board or regulations of the department;

172.2 SS 5-31-74

UNITED STATES COURT OF APPEALS
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JOSE CORDOVA and AMELIA CORDOVA, :
individually and as next friend of :
HECTOR TORRES, a minor and on behalf :
of all other persons similarly situated, :

Plaintiffs - :
Appellants, :

-vs- :

JAMES REED, as Commissioner of the :
Department of Social Services of the :
County of Monroe, and on behalf of :
all other commissioners of local :
departments of social services in the :
State of New York, and ABE LAVINE, :
as Commissioner of the Department of :
Social Services of the State of New :
York, :

Docket # 75-7120

Defendants - :
Appellees. :

AFFIDAVIT OF SERVICE BY MAIL OF BRIEF
ON BEHALF OF APPELLEE REED

CITY OF ROCHESTER
COUNTY OF MONROE
STATE OF NEW YORK

Frank P. Celona, being duly sworn deposes and says that on the 1st day of May 1975, he served the within BRIEF on Behalf of James Reed upon Rene H. Reixach, Esq., the attorney for the above named plaintiffs and upon David Birch, Assistant Attorney General, the attorney for Defendant Abe Lavine by depositing 3 true copies of the same securely enclosed in a post paid

(2)

wrapper in the Post Office Box regularly maintained by the United States Government at 111 Westfall Road, Rochester, New York 14620 in said County of Monroe directed to the said attorney for plaintiffs at 80 West Main Street, Rochester, New York 14614 and directed to David Birch, Assistant New York State attorney General at Department of Law, Two World Trade Center, New York, New York 10047, that being the address within the state designated by them for that purpose upon the preceding papers in this action, or the place where they then kept an office between which places there then was and now is a regular communication by mail. Deponent is over 18 years of age, is not a party to this action and resides at Rochester, New York.

Frank P. Celona

FRANK P. CELONA

Sworn to before me

this 1 day of May, 1975

Charles G. Porreca

CHARLES G. PORRECA
NOTARY PUBLIC, State of N. Y., Monroe County
My Commission Expires March 29, 1977

of which the within is a copy, duly granted
in the within entitled action, on the
_____ day of
_____, 19____, and duly entered
in the office of the Clerk of the County
of _____ on the
_____ day of _____ 19____
Dated _____, N. Y.,
_____ 19____

Office and Post Office Address
111 Westfall Road
ROCHESTER, N. Y. 14620

To _____
Attorney for _____

_____, being duly sworn, deposes and says that on the _____ day of _____ 19____ he served the within _____ upon _____ the attorney _____ for the above named _____ by depositing a true copy of the same securely enclosed in a postpaid wrapper in the Post Office _____ a Branch Post Office _____ a Post Office Box regularly maintained by the United States Government at _____ in said county of _____ directed to said attorney _____ for the _____ at _____ N. Y., that being the address within the State designated by _____ h _____ for that purpose upon the preceding papers, _____ h _____ then kept an office between which places there then was and in this action, or the place where _____ h _____ now is a regular communication by mail. Deponent is over 18 years of age, is not a party to this action, and resides at _____

Sworn to before me, this _____ day of _____ 19____

AFFIDAVIT OF SERVICE BY MAIL

SSD-150-037-71